No. 21,786

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

F. J. BUCKNER CORPORATION, dba UNITED ENGINEERING COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONER'S OPENING BRIEF.

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PETITIONER'S OPENING BRIEF.

I.

JURISDICTION.

The Decision and Order of the National Labor Relations Board, dated February 23, 1967 found that petitioner was guilty of certain unfair labor practices within the meaning of Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act.

Jurisdiction to review the Board's Decision and Order is conferred upon this court by petition filed April 19, 1967 by F. J. Buckner Corporation dba United Engineering Company, an "aggrieved person", 29 USCA §160(f).

II.

STATEMENT OF THE CASE.

Mr. F. J. Buckner, the President of the F. J. Buckner Corporation which operates dba United Engineering Company [Tr. p. 22, lines 3-6][1] decided to terminate Mr. Szczesniak on Friday, March 19, 1965 [Tr. p. 24, lines 8-16]. His decision was made only after he had talked with Mr. Thornberry, the International Representative of the Union [Tr. p. 23, lines 1-19; p. 28, lines 16-19] and Mr. Thornberry had agreed that Mr. Szczesniak should be discharged [Tr. p. 25, lines 1-18].

Subsequent to his discharge Szczesniak filed a written grievance [Resp. Ex. 1].

That grievance was settled on April 2, 1965. At that time, in conformance with the contract [Art. 8, G.C. Ex. 2], the Company and the Union, at step two of the grievance procedure [Art. 8, 2 G.C. Ex. 2], found the "Company had good and sufficient reason to terminate Mr. Szczesniak." [Resp. Ex. 6].

The committee settled the grievance in accordance with the contract [Art. 8, 2, G.C. Ex. 2], and set their settlement into writing [Resp. Ex. 6].

At some later time, Mr. Walker of the Union talked with Mr. Buckner and Mr. Loy [Tr. pp. 93-96]. The gist of that conversation was that Mr. Walker felt Step 4 of the grievance procedure should be used [Art. 8, 4, G.C. Ex. 2] but, upon finding Step 2 had been complied with, though he perhaps did not agree with

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[1][Tr.] throughout refers to the transcript of the proceedings before the Trial Examiner, [TXD] refers to the Trial Examiner's Decision and [G.C. or Resp. Ex.] to the General Counsel's or petitioner's herein; respondent's below, exhibits admitted into evidence at the hearing.

the result [Tr. p. 95, lines 14-15], neither he nor the Union took any action to institute proceedings under Step 4 of the grievance procedure [Tr. p. 95, lines 18-26]. Of course, the union was correct in its non-action since the grievance had been conclusively settled under Step 2 of the grievance procedure.

At the hearing in this matter the Trial Examiner admitted the affidavit of Frank Buckner over the objections of respondent's counsel [Tr. p. 116].

The affidavit was obtained by a representative of the National Labor Relations Board [Tr. p. 45, lines 1-24].

Buckner testified that he was told by the agent:

> ". . . that he was merely getting information so that when they referred this to Washington that there wouldn't be a kickback on the Local Board and that they would have sufficient grounds to deny the complaint." [Tr. p. 46, lines 20-24].

and,

> ". . . he said that he had been down and talked to the stewards and, as far as he was concerned, there was no—I don't know how to express it—that there was no legitimate reason for filing an unfair labor practice charge." [Tr. p. 47, lines 5-10].

There is no evidence that Buckner was advised of his constitutional rights to remain silent or to consult an attorney.

The affidavit contained what the Trial Examiner found to be admissions of illegal conduct. The Trial Examiner relied on the affidavit in his decision [TXD,

p. 1, 3d para. p. 2, lines 27-31; p. 2, lines 20-31]. The Board, on review, in turn considered "the entire record in the case" which necessarily included the affidavit [Tr. p. 23].

In about May of 1965, Buckner was contacted by another agent of the Board, at which time certain documents were delivered by Buckner to the agent. All the documents were not returned to Buckner at the hearing [Tr. pp. 246-248].

The Trial Examiner below concluded that Szczesniak had not filed verbal grievances, in violation of the contract, after March 3, 1965 [TXD, pp. 3-4 N. 7].

III.

QUESTIONS PRESENTED.

1. Did the Board and the Trial Examiner err in refusing to defer to the decision of the grievance committee which determined that Szczesniak's discharge was proper?

2 Was the affidavit of Buckner properly admitted into evidence and considered by the Board and the Trial Examiner, though it was obtained by false and misleading statements tantamount to promises of a Board agent?

3. Was the affidavit of Buckner properly admitted into evidence and considered by the Board and the Trial Examiner, though it was obtained without advising Buckner of his constitutional right to remain silent and to have the advice of counsel?

4. Was petitioner herein denied due process of law or fair play in that the Board did not return all of

respondent's documents which were taken from respondent's President by a Board agent during the investigation of this matter?

IV.
SPECIFICATION OF ERRORS.

1. It was error for the Board and the Trial Examiner not to defer to the decision of the grievance committee and to conclude that the Board was not deprived of jurisdiction by such decision [TXD, p. 4].

2. It was error for the Board and the Trial Examiner to admit into evidence and to consider the affidavit of Buckner in reaching their decisions that petitioner herein was guilty of violations of 8(a)(1) and 8(a)(3), NLRA.

3. It was error for the Board to conclude that the principles of *Escobedo v. Illinois*, 378 U.S. 478 and following cases were inapplicable to this proceeding.

4. It was error for the Board to conclude that failure to return documents to petitioner herein did not require dismissal of the Complaint.

V.
ARGUMENT.

A. It Was Error for the Board and the Trial Examiner Not to Defer to the Decision of the Grievance Committee and to Conclude That the Board Was Not Deprived of Jurisdiction by Such Decision.

The Trial Examiner's statement of facts concerning the settlement of Szczesniak's grievance [TXD, p. 3, lines 42-51] is substantially correct, however the last sentence is misleading. It is under the term of the contract [Art. 8(4) G.C. Ex. 2] impossible to "unsuccessfully seek arbitration" [TXD, p. 3, lines 50-51].

The contract states that if the matter is not settled, it *shall* be referred to arbitration. It is absurd to suggest that one adversary must receive the permission of another to compel arbitration! To the contrary, both the Federal and California arbitration laws provide the machinery whereby the recalcitrant party can be compelled to arbitrate.

The company correctly believed that the Szczesniak grievance was settled. If Walker and the union did not think so, they could formally demand arbitration, then if the company refused, the union had every right to petition to compel arbitration. Failing to do either the arbitral process had ended, and the issue was settled.

The Board would have this court disregard in good measure the teachings of the Steelworker trilogy[2] and this court's own acknowledgement of the:

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[2]*United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

". . . policy favoring speedy settlement of industrial disputes."

Association of Indus. Scientists v. Shell Dev. Co., 348 F. 2d 385, 389 (9th Cir. 1965).

The Board by refusing to defer, absent an actual arbitration hearing, to the grievance procedure is clearly not encouraging the speedy resolution of industrial disputes between the parties.

The Board on many occasions has recognized settlements of grievances in accordance with the contract. The landmark case is the *Spielberg* case, *Spielberg Mfg. Co.,* 112 NLRB No. 139, 36 LRRM 1152 (1955). That case held that the Board should acquiesce, in an exercise of its discretion, in an arbitration award where:

1. All parties had agreed to the arbitration award;
2. The proceedings were fair and regular; and
3. The settlement was not clearly repugnant to the purposes and policies of the Act.

From that modest beginning, the Board, with encouragement from the United States Supreme Court, see *United Steelworkers of America v. American Mfg. Co.,* 363 U.S. 564, 568 (1960), has come to recognize that:

> "If complete effectuation of the federal policy is to be achieved, we firmly believe that the Board, which is entrusted with the administration of one of the many facets of national labor policy, should give hospitable acceptance to the arbitral process as 'part and parcel of the collective bargaining process itself' and voluntarily withhold its undoubted authority to adjudicate alleged unfair la-

> bor practice charges involving the same subject matter, unless it clearly appears that the arbitration proceedings were tainted by fraud, collusion, unfairness, or serious procedural irregularities or that the award was clearly repugnant to the purposes and policies of the Act."

International Harvester Co., 138 NLRB No. 88, 51 LRRM 1155, 1156-57 (1962) *afd. sub nom Ramsey v. NLRB,* 327 F. 2d 784 (7th Cir. 1964) *cert. den.* 377 U.S. 1003, reh. den. 379 U.S. 874.

That case, too, involved an 8(a)(3) violation, and the arbitator's award, though not free from all doubt, was recognized by the Board as controlling.

In *Modern Motor Express, Inc.,* 149 NLRB No. 147, 58 LRRM 1005 (1964), a case similar to ours, the employer terminated an employee for insubordination. The grievance committee upheld the employer's position. The employee had filed some three grievances in a period of five months. The Board, in rejecting the Trial Examiner's theory that the issue of grievance filing was eliminated by the Committee Chairman, apparently believed that issue was settled by the committee, and deferred to its resolution of the problem.

Of course, individual rights of an employee may be bargained away by the bargaining agent of that employer.

> *Aeronautical Indus. Dist. Lodge v. Campbell,* 337 U.S. 521 (1948);
>
> *Ford Motor Co. v. Huffman,* 345 U.S. 330 (1953);
>
> *Humphrey v. Moore,* 375 U.S. 335 (1964).

And where a grievance procedure is utilized to settle an issue, even where individual employee's right are concerned:

> "The decision of the committee, reached after proceedings adequate under the agreement, is final and binding upon the parties, just as the contract says it is." *Humphrey v. Moore, supra* at 351.

Where an award of a grievance committee is final and binding, as is the one in this case, it is not open to the courts to reweigh the merits of the grievance—nor should it be open to the Board. *Driver's Union v. Riss & Co.,* 372 U.S. 517 (1963).

Taken together we have:

1. A settlement agreement by representatives of the union and management that is final and binding under the express provisions of the contract due to acquiescence through considered non-action in processing the grievance further. The settlement is final and binding.

Driver's Union v. Riss & Co., supra;
Humphrey v. Moore, supra.

2. The union may bargain away individual rights in arriving at a contract, and it did so by agreeing to the grievance procedure in question. Mr. Szczesniak actually participated in the formation of such a procedure at the negotiation sessions. Thus the first *Spielberg* criterion is met; all parties agreed to the grievance procedure in question.

Spielberg Mfg. Co., supra;
Ford Motor Co. v. Huffman, supra;
Humphrey v. Moore, supra, see esp. concurring opinion, Goldberg, J., at 351-359.

3. The proceedings were substantially as required by the contract.

a. A written grievance was filed;

b. Whereas the Company did not give a written answer to the grievance, a discussion was held "in an effort to resolve the dispute." The union, as represented by the stewards, the Workers Committee, telephone calls to the International Representative and discussion, did agree to a resolution of the grievance.

There is no showing that the proceedings were not fair, nor "regular". Thus the second *Spielberg* criterion is met in a realistic, work-a-day way of doing things. But even more important, the procedure for settling disputes, bargained for and chosen by the parties, settled a dispute, and did just what it was intended to do with a minimum amount of time lost from production of goods and services. It must then be recognized.

Driver's Union v. Riss & Co., supra;

United Steelworkers of America v. American Mfg. Co., supra.

4. The decision arrived at by the union and management was clearly not repugnant to the purposes and policies of the National Labor Relations Act. Initially, the purposes and policies of the Act are to enourage private settlements of labor disputes. If the Steelworkers trilogy tells us nothing else, it does tell us that; and secondly, the action taken by management was thought justified by the workers committee as pointed out above. Thus, the third criterion of the *Spielberg* decision is met.

Petitioner recognizes that the Board is not required by statutory law to defer to a grievance procedure settlement whether an arbitrator has heard the case or not, however the case law greatly favoring internal resolution of disputes which has developed since *Spielberg* at least strongly suggests that it is an abuse of discretion not to defer under the circumstances of this case.

It is highly doubtful if the Board should substitute its judgment for that of the parties involved. Where industrial harmony is maintained through proceedings conforming with the collective bargaining contract even before the burden of an arbitration proceeding, it seems that the ideal of ready communication between management and labor has been reached. We join with the Board in saying that the Board should not substitute:

> ". . . the Board's judgment for that of the arbitrator, thereby defeating the purposes of the Act and the common goal of national labor policy of encouraging the final adjustment of disputes, 'as part and parcel of the collective bargaining process.' " (*International Harvester Co., supra* at 1158).

B. It Was Error for the Board and the Trial Examiner to Admit Into Evidence and to Consider the Affidavit of Buckner in Reaching Their Decisions That Petitioner Herein Was Guilty of Violations of 8(a)(1) and 8(a)(3), NLRA.

1. The General Rules.

It can not now be doubted that evidence obtained in violation of the constitutional rights of the accused may not be used against him in any criminal proceeding.

> *Fahy v. Connecticut,* 375 U.S. 85 (1963) [State Courts];

Shotwell Mfg. Co. v. United States, 371 U.S. 341 (1963) [Federal Courts—Administrative proceedings];

Rogers v. Richmond, 365 U.S. 534 (1961) [State Courts];

Malinski v. New York, 324 U.S. 401 (1945) [State Courts];

Ziang Sung Wan v. U.S., 266 U.S. 1 (1924) [Federal Courts].

Indeed, in cases where a confession obtained in violation of the convicted person's constitutional rights is admitted into evidence, the conviction may not stand.

> "If all the attendant circumstances indicate that the confession was coerced or compelled, it may not be used to convict a defendant. Ashcraft v. Tennessee, supra (322 US p 154, 88 L ed 1199, 64 S Ct 921). And if it is introduced at the trial, the judgment of conviction will be set aside even though the evidence apart from the confession might have been sufficient to sustain the jury's verdict. Lyons v. Oklahoma, 322 US 596, 597 88 L ed 1481, 1483, 64 S Ct 1208."
>
> *Malinski v. New York, supra* at 404.

2. An NLRB Proceeding Is a Quasi-Criminal Proceeding to the Extent That Basic Constitutional Rights May Not Be Denied the "Accused".

The first major realization on the part of the courts that NLRB proceedings should be subject to certain criminal rules of procedure and constitutional prohibitions appears in *NLRB v. Adhesive Prod. Corp.,* 258 F. 2d 403 (2d Cir. 1958).

In that case the *Jencks*[3] rule (requiring the production for the use of the accused of all prior statements of witnesses received and used by the Federal Government in criminal cases) was applied to Board hearings.

> "In our opinion, logic compels the conclusion that these rules are applicable to an administrative hearing."
>
> *NLRB v. Adhesive Prod. Corp., supra* at 408.

See also:

> *Communist Party of United States v. Subversive Act. Con. Bd.,* 254 F. 2d 314 (D.C. 1958).

Misconduct at the administrative investigation level may also cause an inculpatory statement to be inadmissible in a resulting criminal prosecution. As was stated by the court in reviewing a Federal tax case:

> "It is of course a constitutional principle of long standing that the prosecution 'must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth.' Rogers v. Richmond, 365 US 534, 541, 5 L ed 2d 760, 766, 81 S Ct 735. We have no hesitation in saying that this principle also reaches evidence of guilt *induced from a person under a governmental promise of immunity,* and where that is the case such evidence must be excluded under the Self-Incrimination Clause of the Fifth Amendment."
>
> * * *
>
> Petitioners' position is not like that of a person, accused or suspected of crime, to whom a police-

[3] *Jencks v. U.S.,* 353 U.S. 677 (1957).

> man, a prosecutor, *or an investigating agency* has made a promise of immunity or leniency in return for a statement. *In those circumstances an inculpatory statement would be the product of inducement, and thus not an act of free will.*"
>
> *Shotwell Mfg. Co. v. United States, supra* at 347-8 (Emphasis added).

Similar results have been reached by courts where a governmental agent has illegally obtained evidence and the evidence is admitted in a civil, but quasi-criminal proceeding.

In *Rogers v. United States,* 97 F. 2d 691 (1st Cir. 1938), the government sued in a civil action for certain duties on imported liquors. The liquor had been seized as a result of an illegal search. The First Circuit held:

> ". . . we think that a judgment in a civil cause, in the procurement of which evidence thus illegally obtained is used, is likewise rendered invalid." 97 F. 2d at 692.

For a similar result, see,

Ex parte Jackson, 263 Fed. 110 (D.C. Mont. 1920) app. dismissed 267 Fed. 1022 (9th Cir. 1920).

The Supreme Court has stated, in reviewing proceedings incidental to a disbarment proceeding:

> "The threat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion to make a lawyer relinquish the privilege. That threat is indeed as powerful an instrument of compulsion as 'the use of legal process to force from the lips of the accused individual the evidence necessary

to convict him . . .' United States v. White, 322 US 694, 698, 88 L ed 1542, 1546 64 S Ct 1248, 152 ALR 1202."

Spevack v. Klein, ... U.S. ...., 17 L. ed. 2d 574, 578, 87 S. Ct. ....(1967).

The *Spevack* case was, to be sure, a case where the petitioner *refused* to produce certain records or appear at an inquiry. The fact remains, however, that a disbarment proceeding is not a criminal proceeding. And as surely as the investigating authorities could not force such compliance, neither could they have used the evidence if obtained as a result of compulsion or promises.

Malinski v. New York, supra;

Fahy v. Connecticut, supra;

Rogers v. United States, supra.

Applied to our case, we have an agent of the federal government who by making false and misleading statements and promises caused an inculpatory statement to be made by the accused.[4]

There is no question that the statements made by the agent of the federal government were tantamount to promises that the charge would not be prosecuted against Buckner.

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[4]Buckner's testimony concerning the statements made by the Board agent was not questioned by the government, nor was the investigating agent produced though he was an agent of Region 21, which offices are in the same building as the hearing room where the hearing before the Trial Examiner was held. In the absence of any rebutting testimony, Buckner's testimony must be accepted. Cal.Evid. Code §§ 412, 413.

See *National Maritime Union of America v. NLRB,* 353 F. 2d 521, 522 (2nd Cir. 1965). This court may take judicial notice of the location of Region 21. Cal.Evid. Code §§ 451(f), 452(g)(h); *Greeson v. Imperial Irr. Dist.,* 59 F. 2d 529, 531 (9th Cir. 1932) *Salinas Valley Broadcasting Corp. v. NLRB,* 334 F. 2d 604 (9th Cir. 1964).

See:

Shotwell Mfg. Co. v. United States, supra;

United States v. Denno, 259 F. Supp. 784 (S.D. N.Y. 1966).

In such a case this court should set aside and refuse to enforce the Board's order on the ground that Buckner's statement was improperly admitted and considered by the Board and the Trial Examiner.

3. The Rationale Behind the Proposed Rule.

"Our decisions under that Amendment have made clear that convictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth. See Chambers v. Florida, 309 US 227, 84 L ed 716, 60 S Ct 472; Lisenba v. California, 314 US 219, 236, 86 L ed 166, 179, 62 S Ct 280; Rochin v. California, 342 US 165, 172-174, 96 L ed 183, 190, 191, 72 S Ct 205, 25 ALR 2d 1396; Spano v. New York, 360 US 315, 320, 321, 3 L ed 2d 1265, 1269, 1270, 79 S Ct 1202; Blackburn v. Alabama, 361 US 199, 206, 207, 4 L ed 2d 242, 247, 248, 80 S Ct 274. And see Watts v. Indiana, 338 US 49, 54, 55, 93 L ed 1801, 1806,

69 S Ct 1347, 1357. To be sure, confessions cruelly extorted may be and have been, to an unascertained extent, found to be untrustworthy. But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration. Indeed, in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed. Despite such verification, confessions were found to be the product of constitutionally impermissible methods in their inducement. Since a defendant had been subjected to pressures to which, under our accusatorial system, an accused should not be subjected, we were constrained to find that the procedures leading to his conviction had failed to afford him that due process of law which the Fourteenth Amendment guarantees."

Rogers v. Richmond, 365 U.S. 534, 540-1 (1961).

As recognized above by the Supreme Court, the only sure way to insure against such investigating practices as are present in this case is to reverse the conviction, i.e., refuse to enforce the Board's order.

Just so long as such practices do not cause such denials of enforcement then just so long will they continue.

The Supreme Court in *Mapp v. Ohio,* 367 U.S. 643 (1961), in enforcing the Federal exclusionary rule against the States regarding illegally seized evidence stated:

"This Court has ever since required of federal law officers a strict adherence to that command

> which this Court has held to be a clear, specific and constitutionally required—even if judicially implied—deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to 'a form of words'. Holmes, J., Silverthorne Lumber Co. v. United States, 351 US 385, 392, 64 L ed 319, 321, 40 S Ct 182, 24 ALR 1426 (1920). It meant, quite simply, that 'conviction by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts . . .' Weeks v. United States, supra (232 US at 392), and that such evidence 'shall not be used at all.' Silverthorne Lumber Co. v. United States, supra, (251 U.S. at 392)." (367 U.S. at 648.)

In that case, the court recognized that the only way to stop such reprehensible practices was to deny the fruits of the practice.

The practice is no less reprehensible when done by one agent of the federal or state government or another. The penalty should be no less severe.

Nor may it reasonably be argued that in proceedings where immense amounts of money may have to be paid by the victim of the illegal practice that he may not suffer the penalties of a convicted criminal.

Nor may it any longer be reasonably argued that basic requirements of due process and fair play do not apply to Board hearings.

> "This court would unhesitatingly refuse to enforce an order of an administrative board or agency, if issued pursuant to an unfair hearing or without

due process of law. The requirement of fair trial and fair play is binding on administrative agencies as well as on courts."

NLRB v. Newberry Lumber & Chemical Co., 123 F. 2d 831, 838 (6th Cir. 1941);

See:

Ohio Bell Telephone Co. v. P.V.C. of Ohio, 301 U.S. 292 (1937).

The courts, and this court in particular, have given the Board wide discretion in their determinations of both fact, *NLRB v. Deutsch Co.,* 265 F. 2d 473 (9th Cir. 1959) cert. den. 361 U.S. 963; *Salinas Valley Broadcasting Corp. v. NLRB,* 334 F. 2d 604 (9th Cir. 1964) and law, *NLRB v. Retail Clerks Local 648,* 243 F. 2d 777 (9th Cir. 1956).

The precise question before the Court now, however, is what weight to a disregard of constitutional rights? Petitioner herein submits that the only answer is "no weight". And further submits that this court must deny enforcement of the Board's order where:

1. The constitutional violation is clear and uncontradicted;

2. The only way such violations may be prevented is to reject the evidence or reverse the decision where the evidence was relied upon; and

3. The decisions and order do rely on the evidence.

C. It Was Error for the Board to Conclude That the Principles of Escobedo v. Illinois, 378 U.S. 478 and Following Cases Were Inapplicable to This Proceeding.

Escobedo, of course, no longer represents the full extent of the law in matters of interrogation without advice of counsel. Nor, does petitioner herein gainsay that *Miranda* represents the ultimate or even penultimate word:

But *Miranda* does hold:

> "Our holding be spelled out with some specificity in the pages which follow but briefly stated it is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.[4] As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."
>
> *Miranda v. Arizona,* 384 U.S. 436, 444 (1966). [Footnote 4 omitted].

The privilege against self-incrimination is something more than just a rule to keep the police in line. It is at the very base of our society.

Nor is the privilege to be strictly construed:

> "In this Court, the privilege has consistently been accorded a liberal construction."
>
> 384 U.S. at 461.

In the instant case the evidence is without contradiction that Buckner was not advised of his constitutional rights as defined in the *Miranda* case.

The Board only once has considered with anything approaching depth the *Escobedo-Miranda* problem.[5] In *Mary Anne Bakeries,* 164 NLRB No. 30, 65 LRRM 1071 (1967), the Board overruled the Trial Examiner, who indeed did feel that *Escobedo* should apply. The Board's reasoning was twofold:

1. There is no custodial interrogation;

and

2. Unfair labor practice hearings are not criminal proceedings.

Miranda should not be read to apply to only the classic "custodial interrogations". *Miranda,* as shown above, stands for the proposition, above all else, that the government must prove its case without trickery, deception or advantage caused by absence of counsel for the one interrogated.

Nor, as pointed out in Part B of this Argument does the constitution limit itself to classic criminal proceedings, but rather extends to quasi-criminal administrative hearings and civil actions.

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[5]The Board has, of course, had other such cases, *e.g., Crown Imports Co., Inc.,* 163 NLRB No. 4, 64 LRRM 1251 (1967) and this instant case.

The reasons of the Board are not valid. The questions remain:

1. Why should a governmental agency with the power to award huge monetary penalties, and force immense business decisions[6] *not* be required to honor the basic constitutional rights of the citizens?

2. By what stretch of the imagination should a person not be entitled to the due process of law and his constitutional rights simply because a governmental enforcement proceeding is not labeled "Criminal"?

Petitioner submits that there is no justification for not requiring the fundamentals of due process and fair play, as contained in the Constitution of the United States and defined by the United States Supreme Court, at all stages of Board proceedings, from investigation to Board review.

D. The Order Should Not Be Enforced Because the General Counsel Failed to Produce Documents Taken From Respondent's Possession.

The record is clear and without contradiction that Mr. Goode, an agent of the National Labor Relations Board in the course of his investigation took from respondent a file of documents pertaining to the subject of grievances [Tr. pp. 247-248]. They were in the handwriting of Szczesniak, with notations by Loy [Tr. pp. 247-248].

Since one of the key issues in the case, and one on which the Trial Examiner found adversely to respondent was whether Szczesniak filed "verbal" grievances

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[6]See *e.g., Darlington Mfg. Co.*, 139 NLRB No. 23, 51 LRRM 1278 (1962).

after the execution of the current collective bargaining agreement, these documents were highly relevant and material to respondent's defense of the case [See TXD, p. 4 Note 7].

The purported papers likely would have changed that finding, and given such a change, it is presently impossible to know whether the Trial Examiner would not have found that the oral filing of grievances in violation of the contract and excessive absenteeism were the only reasons for the discharge.

As Judge Sobeloff in *Barbee v. Warden, Maryland Penitentiary,* 331 F. 2d 842, 847 (4th Cir. 1964) stated:

> "In the present case, where evidence was withheld by the police which had a direct bearing upon and could reasonably have weakened or overcome testimony adverse to the defendant, we will not indulge in the speculation that the undisclosed evidence might not have influenced the fact finder.[13] 'The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.' 375 U.S. at 86-87, 84 S Ct 230, 11 L ed 2d 171. Involved is a question of fundamental fairness rising to the level of constitutional due process which cannot be brushed aside as a mere error in an evidentiary ruling." (Footnote 13 omitted).

All of the documents delivered to the Board agent were not returned to respondent by the General Counsel [Tr. pp. 247-248]. The General Counsel did stipulate that Mr. Goode, the Board agent, if called as a witness, would testify that he had no recollection about the documents at all [Tr. pp. 143-146].

To allow the General Counsel to deprive a respondent of documents which would materially aid in the preparation of his defense and likely would change the Trial Examiner's decision creates an intolerable situation.

The failure of the General Counsel to deliver documents to respondent to which respondent is entitled has been held to be erroneous in *General Engineering, Inc. v. NLRB,* 131 F. 2d 367 (9th Cir. 1965).

The Board is authorized:

> ". . . to depart from rules of evidence applicable in the federal district courts to the extent that this is necessary because of the peculiar characteristics of administrative hearings. But as the Fifth Circuit held in N.L.R.B. v. Capitol Fish Co., 5 Cir., 294 F.2d 868, 872, no special characteristics of an administrative hearing justify the exclusion of evidence or the revocation of subpoenas which it would be error to exclude or revoke in a federal district court trial."
>
> 341 F. 2d at 374.

The negligent or otherwise unexplained failure of a prosecutor to deliver to a defendant upon motion, documents taken from him during the investigation of a criminal case has been held grounds for dismissing a criminal complaint or indictment or granting of a new trial. *Ingram v. Peyton,* 367 F. 2d 933, 936 (4th Cir. 1966); *United States v. Consolidated Laundries Corporation,* 291 F. 2d 563 (2d Cir. 1961); *United States v. Heath,* 260 F. 2d 623 (9th Cir. 1958).

As this court stated in the *Heath* case:

> "It has been wisely said that the agents of the government should not act an ignoble part. No more ignoble action could be imagined than for them to obtain these documents from the defendant voluntarily, give no receipt to prove their existence and their possession, suffer the records to be destroyed and then claim the right to prosecute when, by their action, his defense is impaired, if not destroyed. But it is urged the action of the trial court leaves the room open for connivance and fraud. It may well be. However, that is no ground for failure to accord the accused rights expressly given by statute or rule. Although the possibility of deception may exist, the public must trust that the trial judges will not be misled." (260 F. 2d at 629.)

The only case found which considers the *Heath-Consolidated Laundries Corp.*, rule in a purely civil action[7] is *Allegheny Corp. v. Kirby*, 333 F. 2d 327 (2d Cir. 1964), *en banc* 340 F. 2d 311 (1965) Appeal dismissed 384 U.S. 28 (1960), *reh. den.* 384 U.S. 967.

In that case the three judge Circuit Court panel split on the issue in three different directions.

Judge Moore concluded that the non-disclosed documents merely supplied additional evidence of an already well-established fact, 333 F. 2d at 334.

Judge Kaufman concluded that the federal courts shoud not apply the rule in state civil actions, basing his decision on ". . . considerations of *res judicata* and comity . . .," 333 F.2d at 338.

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[7]For reasons stated above, we submit that a Board proceeding is at least a quasi-criminal proceeding.

Judge Friendly, on the other hand, concluded that:

> "The test should be more nearly that applied by us in United States v. Consolidated Laundries, supra, 291 F.2d 563,[5] or by the New York courts in Matter of Lautz, 128 Misc. 710, 220 N.Y.S. 782 (Surr. Ct., Erie Co. 1927); and Boston & Main R. R. v. Delaware & Hudson Co., 238 App. Div. 191, 196, 264 N.Y.S. 470, 477 (3d Dept. 1933)—whether there is any fair basis for thinking the undisclosed evidence *might have changed* the result. Here the evidence could well have done that." (Footnote 5 omitted).

In an *en banc* hearing, cryptically reported at 340 F. 2d 311 (2d Cir. 1965), the eight participating judge split 4-4. Certiorari was granted, 381 U.S. 933 (1965), and then the appeal dismissed 384 U.S. 28, with three justices dissenting and two not participating.

The history of that case hardly suggests that the issue is a simple one, particularly where in the instant case we have:

1. A federal agency;
2. With the power to conduct extensive investigations; and
3. A fair probability that the evidence would have changed the result;
4. Had it not been lost or carelessly misplaced by the government; and
5. The evidence came from and was part of the records of the individual defendant in the Board proceeding.

VI.
CONCLUSION.

This Court should not enforce the Board's order for the reasons stated above. Alternatively, if this court holds that the Board acted properly in not deferring the grievance committee decision, but that the Buckner affidavit was improperly admitted and considered, this court could remand this case to the Board for a new hearing.

Dated: August 30, 1967.

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DAVID A. MADDUX